

Editor's note: 91 I.D. 115; Overruled to the extent inconsistent with Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (Oct. 4, 1991)

ANIMAL PROTECTION INSTITUTE OF AMERICA
SIERRA CLUB
COLORADO OPEN SPACE COUNCIL

IBLA 84-104

Decided February 17, 1984

Motion to dismiss appeals of decision of the Grand Junction District, Bureau of Land Management, to allow drilling of oil and gas wells in the Little Book Cliffs Wilderness Study Area and Wild Horse Range. CO-070-066. Denied.

1. Administrative Procedure: Administrative Review -- Appeals -- Environmental Policy Act -- Environmental Quality: Environmental Statements

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination challenging the adequacy of the environmental assessment of the cumulative impacts is not premature.

APPEARANCES: Joyce S. A. Tischler, Esq., San Anselmo, California, for the Animal Protection Institute of America; William S. Curtiss, Esq., Denver, Colorado, for Sierra Club and Colorado Open Space Council; Marla E.

Mansfield, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On September 29, 1983, the District Manager, Grand Junction District, Bureau of Land Management (BLM), signed a "Decision Record" to accompany the revised final environmental assessment (EA) on oil and gas development in the Little Book Cliffs Wilderness Study Area (WSA) and Wild Horse Range (WHR). The District Manager stated that he had decided to accept the proposed action as shown in the July 1983 EA. That action consists of allowing the drilling of 16 oil and gas wells within the project area and construction of approximately 18 miles of associated roads and pipelines. Each well will be subject to specific approval after further field analysis. The District Manager also concluded that no significant impacts would result from the proposed action and therefore found that an environmental impact statement was not required.

The Animal Protection Institute of America, the Sierra Club, and the Colorado Open Space Council have separately appealed the decisions of the District Manager as presented by the decision record. In response, counsel for BLM has moved to consolidate the appeals; that motion is hereby granted with the concurrence of appellants. Counsel for BLM has also requested the Board's expedited consideration and issuance of an interlocutory order informing appellants that their appeals are untimely and dismissing the appeals. If the Board declines to dismiss the appeals, counsel requests that the Board put BLM's decision in full force and effect. Appellants oppose dismissal, arguing that their appeals are proper.

Appellants generally challenge BLM's decision to approve drilling permits in the WSA and WHR, the finding of no significant impact (FONSI), and the adequacy of the final EA supporting those decisions.

In its motion to dismiss, BLM argues that the decision record only summarizes and accepts the July 1983 EA which analyzes various levels of proposed development on existing leases and makes a FONSI. BLM argues that a FONSI or an EA itself is not appealable as these documents represent compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976), a prerequisite to a decision to act but not an action itself. BLM admits that by analyzing a proposed action, the documents do provide a prediction of a future course of action, but asserts that they do not represent grant of approval; they merely indicate an intention to act. BLM urges that when each application for permit to drill (APD) is approved, appellants will have an appropriate opportunity to appeal and challenge the adequacy of BLM's environmental review. BLM contends that this Board only reviews "final decisions" of an authorized BLM official; if additional actions are necessary to enable a proposed action to proceed, the Board does not have before it an appealable decision. BLM suggests that it could not act in an orderly fashion if interlocutory appeals from each step in the decisionmaking process were heard.

The EA was initiated apparently as a result of the receipt of numerous APD's from several oil and gas companies. A public notice was published in the newspaper on December 2, 1982, stating that the Minerals Management Service (MMS) planned to prepare an EA "of the potential effects of oil and gas activity on an area 8 miles northeast of Grand Junction, Colorado, that

is comprised of the Little Bookcliffs Wildhorse Area and the Little Bookcliffs Wildhorse Wilderness Study Area" and inviting public comment. ^{1/} Appellant Colorado Open Space Council submitted initial comments.

On March 31, 1983, BLM made a FONSI and a decision to proceed with development based on its prepared EA. Review of its initial findings is useful to understanding the nature of the decision now being challenged. It reads:

[BLM] proposes to continue to approve or disapprove Applications for Permit to Drill (APD's), and associated development activities in the Little Bookcliffs Wilderness Study Area and Little Bookcliffs Wildhorse Area as provided for by applicable laws, regulations and in accordance with accepted standard industry practices. It is anticipated that 68 to 220 well sites and 68 to 100 miles of roads and pipelines would be constructed in the Environmental Assessment (EA) area. The construction of roads, pipelines, and drillsites would result in 640 to 1100 acres of surface disturbance.

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Considerable impairment would occur to the wilderness values * * * and to the objectives identified in the Little Bookcliffs Wildhorse Management Plan. Development in the EA area has been a point of contention between wilderness groups * * *, other special interests * * * and the mineral industry * * *. This controversy will likely continue * * *, although at an insignificant level. Alternatives to development; no action, and delayed action were considered and analyzed in the EA. The potential environmental

^{1/} On Dec. 3, 1982, the Secretary of the Interior assigned all functions relating to minerals management of Federal and Indian lands, including the approval of drilling permits and production plans, and inspection and enforcement, to BLM. Secretarial Order No. 3087, as amended, Feb. 7, 1983 (48 FR 8983) (Mar. 2, 1983)). Although there is no background material in the file explaining the genesis of the MMS action, it is consistent with the Supreme Court's holding that when various actions that will have cumulative or synergistic environmental impact upon a region are pending currently before an agency, their environmental consequences must be considered together. Kleppe v. Sierra Club, 427 U.S. 390 (1976). The circumstances under which segmentation of projects for purposes of environmental analysis is permissible are limited. Cf. Citizens for Glenwood Canyon, 64 IBLA 346, 351 (1982).

impacts which may result from the proposed development have also been analyzed. Mitigation and monitoring stipulations would become part of the operating plan and conditions of approval of site specific proposals to ensure that development complies with the requirement for preventing unnecessary and undue degradation.

It has been determined that the proposed development be allowed as described in the EA. This is not a major Federal action that would significantly affect the quality of the human environment; therefore, an environmental impact statement is not necessary. This determination was made after consideration of context and intensity as required by National Environmental Policy Act (NEPA), 40 CFR 1508.27, and included the following factors:

1. Cumulative impacts expected from the development are not shown to be significant; however, considerable impairment to the wilderness characteristics of the LBWSA and to the management objectives of the WHA would occur. The significance of the impacts were considered in relation to the valid existing rights of oil and gas lease holders involved, and the relatively small geographic area of consideration.
2. This project is not precedence [sic] setting. Projects of a similar nature have been previously approved elsewhere within the Bureau of Land Management wilderness study areas.
3. There are no floodplains or wetlands as defined by E.O. 11988 and 11990, nor [are] threatened or endangered species habitat or cultural resources expected to be impacted.
4. The action is in conformance with regulations, objectives and guidelines for the management of resources on public lands, and the policy for treatment of wilderness study areas.

The version of the EA approved March 31 identified the primary issues to be addressed as:

What are the potential cumulative impacts of oil and gas development on 1) the wilderness study area with respect to future decisions on suitability for recommendation for wilderness designation, 2) on the wild horses and their designated range, and 3) on the deer that concentrate on the winter range in the EA area.

Thus, BLM's concern was the impact of development in the WSA and WHR and the degree to which development should be allowed.

Appellants Sierra Club and Colorado Open Space Council were provided copies of BLM findings on April 5, 1983. On April 25, 1983, they filed a notice of appeal challenging BLM's finding of no significant impact and asserting that they had been advised by the Deputy Minerals Manager that the FONSI constituted a final decision, despite the creation of a public review period. On May 6, 1983, the Colorado State Director, BLM, advised them that their appeal was premature, since no actions (such as granting permits to drill or rights-of-way) had yet been approved on the basis of the environmental assessment. He indicated that he regarded the notice of appeal as a formal protest which he would review and weigh at the time any such action was contemplated.

On or after May 18, 1983, appellants filed a second notice of appeal, attacking the propriety of the State Director's decision of May 6, 1983, to consider their first "appeal" as a protest, rather than forward it to this Board. BLM, through counsel, filed a motion to dismiss both notices of appeal, arguing that this Board lacks jurisdiction since BLM had issued no appealable decisions.

By order dated June 10, 1983, this Board dismissed the appeal, concluding that appellants' first appeal was premature because the FONSI was not a final decision in that it was issued with provisions for a 20-day comment period. We said that the allowance of a comment period clearly contemplated the possibility that BLM would modify the FONSI based on comments received; thus, it was not final. We noted particularly that our reasoning in finding the appeals premature was different from that of the Colorado State Director.

In July 1983 the revised final EA was distributed to interested parties for comment. In this EA, the proposed action and alternatives considered were significantly different from the initial EA. The proposed action had been changed to the drilling of 16 oil and gas wells over the next 3 years within six oil and gas units. The medium and high level alternatives considered would allow drilling of 68 or 220 wells, respectively. BLM also considered a no action alternative. Following an extended comment period, BLM sent the decision record previously described and at issue here, responses to comments received, and the changes made to the EA as a result of the comments to interested parties.

Preliminarily, we note that this Board has been delegated the authority to decide "finally for the Department appeals * * * from decisions rendered by Departmental officials" relating to various identified subject matters. 43 CFR 4.1(3) (emphasis added). The regulations provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." 43 CFR 4.410 (emphasis added). In neither case is the phrase "final decision" used. While we agree with BLM that the Department would not be well served by permitting appeals at any point in the decisionmaking process, the right to appeal does not turn on what BLM considers to be its final act in a given matter or circumstance. Rather it turns on whether the appellant is a party to the case and whether the appellant has been adversely affected by a BLM decision which is sufficiently ripe for administrative review. Determination of those issues turns on the nature of the decision being appealed.

We agree with BLM that a FONSI or EA document in and of itself is not appealable because it represents analysis of a contemplated action as required by NEPA and does not constitute an action, separate from the action analyzed, that could adversely affect a party. Neither is a decision to proceed with or take the action addressed. See 40 CFR 1508.9, 1508.13. It is the contemplated action that may adversely affect a party and, until a decision is made to take such action, an appeal is premature. Utah Wilderness Association, 65 IBLA 219 (1982).

Thus, most of the cases that have been presented to this Board challenging the adequacy of BLM's environmental review have been protests or appeals of the approval of a specific application or project.

See, e.g., Colorado Open Space Council, 73 IBLA 226 (1983) (protest against approval of APD on lease C-12826); Southwest Resource Council, Inc., 73 IBLA 39 (1983) (appeal of approval of proposed plan of operation to explore for uranium in WSA); Citizens for Glenwood Canyon, 64 IBLA 346 (1982) (protest against issuance of a right-of-way); Sierra Club, 57 IBLA 79 (1981) (protest against issuance of special recreation permit). In each case the EA was site-specific, addressing the particular impacts of the contemplated action as proposed and identifying alternatives. In such cases, a party could not be adversely affected until the contemplated project was approved. The Board has also reviewed the adequacy of environmental review in connection with decisions to implement regional management programs. SOCATS (On Reconsideration), 72 IBLA 9 (1983), Dolores M. Lisman, 67 IBLA 72 (1982) (protests against adoption of vegetative management program). In these cases, however, the parties were adversely affected when BLM denied the protests and approved the programs. The parties did not have to wait and appeal the specific actions implementing the program.

[1] In moving to dismiss this appeal BLM urges that because no APD's have been approved, no action has been taken and, thus, appellants are not adversely affected and their appeal is premature. 2/ Review of the decision record and EA reveal, however, that the action at issue is not the individual approval of 16 separate APD's. Although couched in terms of the approval of the 16 APD's, the action contemplated by the EA and FONSI and approved in the decision record is the overall approval of drilling in the Little Bookcliffs WSA and WHR. The question analyzed in the EA is whether and to what degree drilling should be permitted at all. The EA focuses on the cumulative impacts of various levels of drilling; not on the site-specific impacts of particular APD's. Indeed, the EA presents no discussion of the individual sites of the 16 wells at all, states that only seven even have a proposed location, and would support a decision to approve one of the 16 APD's only in the most general sense. Thus, we conclude that the appeals are not premature; they dispute BLM's decision to allow oil and gas drilling and development in the WSA and WHR, not the approval of particular APD's.

Moreover, we conclude that were we to fail to hear appellants' arguments now, the issues identified above would not be addressed timely, if at all, and then only with difficulty. 3/ Individual appeals of the approvals

2/ Since appellants had participated in the development of the EA and their views were known to and responded to by BLM, appellants are properly parties to the case with a right of appeal, not protestants. California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Since the BLM decision adversely affected their interests, they have standing to appeal. Elaine Mikels, 41 IBLA 305, 307 n.1 (1979); see In re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982)

3/ Decisions of BLM concerning rights-of-way and applications for permits to drill are not stayed pending appeal. See 43 CFR 2804.1(b); 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983) (formerly 30 CFR 221.66). Such decisions are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review. See 43 CFR 4.21(b).

of the 16 APD's would not provide the appropriate opportunity to address the cumulative impacts of the drilling development on the WSA and WHR unless all decisions were issued simultaneously and all the appeals consolidated. We have been given no indication that BLM intends to process and approve all the APD's jointly. It would seem to serve no useful purpose to do as BLM seems to suggest: evaluate this EA in the context of an individual APD approval which the EA does not specifically address. Furthermore, dealing with the APD's sequentially on the question of the cumulative impacts of drilling would place an unfair burden on the operators or lessees whose permits were approved later to rebut the cumulative impacts arguments.

The Council on Environmental Quality regulations recognize that there are various types of actions for which environmental analysis must be done -- from the implementation of programs and policies to site-specific projects; that the effects of an action may be localized or regional; that connected, cumulative, or similar actions may require discussion in a single environmental document. See 40 CFR 1508.25, 1508.27, and 1508.28. In addition, the regulation on tiering (the coverage of the general matters in a broad environmental impact statement (EIS) with narrower EIS's or EA's incorporating the general discussion by reference and concentrating on specific issues) concludes with the statement that "[t]iering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 CFR 1508.28(b).

Similarly, we find that it is clearly appropriate to address the areawide decision to allow oil and gas development in the WSA and WHR now, before

the individual APD's are considered. Furthermore, we observe that it is more efficient in this case to resolve the challenge to the decision to proceed with development as a whole before BLM expends time and money to process the individual APD's. Accordingly, BLM's request that its decision be put into effect is denied. The case will receive the requested expedited treatment, however.

BLM will have 30 days from receipt of this decision to file an answer to appellants' statements of reasons. In keeping with the sense of urgency expressed by BLM's request for expedited treatment of these appeals, no extensions of time will be granted unless extraordinary circumstances are presented.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss these appeals is denied.

Will A. Irwin
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge